(14)

IN THE

Supreme Court of the United States

OCTOBER TERM—1943

No. 173

FREDDIE RICH,

Petitioner,

—*against*—

EULA MARLENE RICH,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

JOSEPH NEMEROV,
Counsel for Petitioner.

MAURICE J. DIX,
GEORGE GUSSAROFF,
Of Counsel.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Freddie Rich petitions for a writ of certiorari to review an order of the United States Circuit Court of Appeals for the Second Circuit, which affirmed an order of the District Court of the United States for the Southern District of New York (R. 28-29) that set aside the discharge in bankruptcy granted by the Referee to the petitioner (R. 23-24).

Summary Statement of Matter Involved.

Petitioner filed a voluntary petition in bankruptcy on March 29, 1940 (R. 18).

Petitioner and respondent are husband and wife, judicially separated. Respondent's bankruptcy claim against petitioner is not for alimony, for that is being paid. Respondent's claim is based on loans (R. 3). Respondent is the only one of petitioner's creditors to oppose the discharge.

The respondent filed six specifications of objections to petitioner's discharge (R. 5-17). The Referee found that none had been sustained (R. 20-22). Without finding that the Referee's conclusion was clearly erroneous, the Courts below reversed the Referee and sustained the first and fourth specifications.

The Referee conducted thorough and exhaustive hearings on four separate days. After mature consideration of the evidence, seeing and hearing the petitioner and the witnesses who testified, the Referee rendered his opinion in writing and findings (R. 18-22). He said *inter alia*:

> "However, with regard to the First Specification, it does appear that the bankrupt did keep certain records and papers which were delivered by him to the Trustee in Bankruptcy or to his former attorneys, Messrs. Gluskin and Richardson, the latter of whom claimed a lien on the books, papers and records for the value of his legal services, although he testified in the proceedings and had with him some of said records.
>
> It is a fact that the bankrupt did not keep a complete set of books but it appears that he is a musician, known for his conducting certain radio programs, and that for the greater portion of the time, concerning which he was examined, he was represented by various representatives who attended to the business details and who kept records showing the various payments made and amounts that were delivered to the bankrupt.
>
> * * * * *
>
> The testimony is such that it does not lend itself easily to summary but a careful examination of the same has led the undersigned Referee to the conclusion that the character of the occupation of the bankrupt was such that his failure to keep a complete set of books was justified under all the circumstances of the case,

especially in view of the fact that details were available in the books of his representatives. The undersigned is therefore of the opinion that the First Specification has not been sustained.

* * * * *

With reference to the Fourth Specification, that the bankrupt testified falsely under oath, it does appear that the bankrupt, apparently laboring under emotion, failed to remember certain matters concerning which he was questioned, but an examination of all of the testimony in the proceeding will disclose that subsequently particulars were given, and it can not be said that the bankrupt testified wilfully falsely in the proceedings.

On the whole case, the undersigned Referee is of the opinion that the Fourth Specification has not been sustained.

* * * * *

In view of the above, the undersigned Referee is of the opinion that the discharge of the bankrupt should be granted."

The Facts.

The petitioner is a musician. He conducted an orchestra which performed over the radio for a single sponsor for a stated period of time under a written employment contract (R. 20). Pursuant to its terms all compensation covering the radio broadcasts were made to the petitioner's representative, sometimes called agent or business manager (R. 108-140). From the employment compensation thus received petitioner's representative paid all expenses of the broadcast, such as the musicians comprising the orchestra, overtime, special orchestration arrangements and regular orchestration arrangements, musician's union fees, unemployment, social security and other taxes, and commissions to booking agents and other personal representatives (R. 91-99). The

net remaining after these deductions was paid over to the petitioner as his personal compensation (R. 93-99). These receipts and disbursements are recorded in petitioner's books and records (R. 69-70; 91-99). Petitioner surrendered to the Trustee in Bankruptcy all the records in his possession including his employment contracts with his radio sponsor and with his agent and business manager (R. 69-70; 91-99). The petitioner's agent testified before the Referee, and at said hearings produced the books and records which he maintained (R. 91-99).

The Referee found that the petitioner's books and records satisfied the statutory requirement (R. 20-21).

The Circuit Court and the District Judge resolved against petitioner a factual controversy in which the Referee's inferences of the evidence were rejected by these Courts, because they would have drawn a different conclusion, were the matter before them as an original proposition instead of as a reviewing Court. Neither of these Courts found or stated that the Referee's conclusion is "clearly erroneous" or that it is without support in the evidence; for such is not the fact. The Referee's conclusion is supported by substantial evidence.

Question Presented.

The question presented is whether Section 38 of the Bankruptcy Act, as amended by Act of Congress June 22nd, 1938, by the addition of Clause 4 (11 U. S. C. A. 66), permits either the District Judge or the Circuit Court to set aside a discharge in bankruptcy granted by a Referee, in the absence of a finding that the Referee's conclusion was "clearly erroneous"?

The Jurisdiction of this Court.

The order to be reviewed was entered in the Circuit Court of Appeals on May 5, 1943.

The jurisdiction of this Court to review the order of the Circuit Court of Appeals, for the Second Circuit, is invoked under Section 240(a) of the Judicial Code as amended by Act of Congress February 13th, 1925 (28 U. S. C. A. 347(a)).

Reasons for Allowance of the Writ.

The cause presents a question of prime importance in the administration of justice in all the Courts of the United States in that it involves construction of Section 38 of the Bankruptcy Act, as amended, with Clause 4 added (11 U. S. C. A. 66), which has not been heretofore interpreted by this Honorable Court (*Wragg* v. *Federal Land Bank of New Orleans*, 317 U. S. 325: 63 S. Ct. 40; *Leishman* v. *Associated Wholesale Electric Co.*, 318 U. S. 203).

Prayer.

WHEREFORE, petitioner respectfully prays that this Honorable Court issue under the seal of this Court a writ of certiorari directed to the United States Circuit Court of Appeals for the Second Circuit, commanding that Court to certify and send to this Court a full and complete transcript of the record and the proceedings of said Court had in this case, to the end that this cause may be reviewed and determined by this Court; that the order herein of said United States Circuit Court of Appeals be reversed; and that petitioner be granted such other and further relief as may be proper.

FREDDIE RICH

By JOSEPH NEMEROV
His Counsel

Dated, New York, N. Y., July 8, 1943.

IN THE

Supreme Court of the United States

OCTOBER TERM—1943

No.

FREDDIE RICH,

Petitioner,

—against—

EULA MARLENE RICH,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Opinions Below.

The opinion of the Circuit Court of Appeals may be found in the appendix hereof, and, is reported at 134 Fed. (2d) 779.

The opinion of the District Judge may be found in the printed transcript of the record used in the Circuit Court, at pages 144-148.

The opinion and findings of the Referee may be found in the printed transcript of the record used in the Circuit Court, at pages 18-22.

Jurisdiction.

A statement as to jurisdiction appears in the petition pages 4-5 above.

Statement of the Case.

A summary statement of the facts involved is given in the petition pages 1-4 above.

POINT I.

The Circuit Court and the District Judge erred in setting aside the discharge in bankruptcy granted to the petitioner by the Referee in the exercise of the exclusive jurisdiction vested in the Referee under the Bankruptcy Act as amended in 1938.

By act of Congress of June 22, 1938, substantial and radical changes were made in the Bankruptcy Act. This petition for certiorari requires consideration and construction of the amendments dealing with discharge in bankruptcy and the Referee's powers and functions in connection therewith.

Prior to the amendments, whether to grant or deny a discharge was a function primarily and exclusively within the jurisdiction of the District Judge. The 1938 amendments transferred that jurisdiction, function and primary duty to the Referee.

Formerly, Section 1(7) of the Bankruptcy Act defined "Court" as "the court of bankruptcy in which the proceedings are pending, and may include the referee". The amended act redefined Court as follows:

> "Sect. 1(9) 'Court' shall mean the judge or the referee of the court of bankruptcy in which the proceedings are pending; * * *"

The change is to make clear that generally and not in special instances the functions of the bankruptcy court may be exercised by the Referee. (Report of the House Committee on Judiciary July 29, 1937 page 5.) The Referee is no longer a master acting merely in an advisory capacity to the District Judge.

The former Section 14(a) of the Bankruptcy Act required the bankrupt to "file an application for a discharge in the

Court of Bankruptcy * * *" Under the amended Section 14(a) "The adjudication * * * shall operate as an application for a discharge:"

The former Section 14(b) of the Bankruptcy Act provided "The judge shall hear the application for a discharge and such proofs and pleas * * * in opposition thereto * * *" The amended Section 14(b) provides that "the court shall hear such proofs and pleas * * * in opposition to the discharge * * *" In making the change from the "judge" to the "court" (as redefined by Section 1(9)), Congress clearly intended that the Referee, instead of the judge, shall hear and determine the bankrupt's application for a discharge.

Section 38 of the Bankruptcy Act as amended in 1938 with the addition of clause 4 (11 U. S. C. A. 66) is unequivocal. It expressly provides:

> "Referees are hereby vested, subject always to a review by the judge, with jurisdiction to * * * (4) grant, deny, or revoke discharge; * * *"

This is a new jurisdiction for the Referee. At paragraph 5108, C. C. H. Bankruptcy Law Service says of this change:

> "It does away with the hearing of these matters by the referees on reference to them as special masters and their report back to the judge. Having not only an opportunity to hear, but to also observe the witnesses, the referees are better able to determine the issues than the judges who have only information given them by the referee. This should expedite proceedings and save expense. Report of the House of Committee on the Judiciary, June 29, 1937, page 10."

Prior to the addition of Clause 4 to Section 38, the Referee's findings were advisory and subject to Bankruptcy General Order 47 and Rule 53 (e) (2) of the Rules of Civil

Procedure. As a result of the addition of Clause 4, the referee no longer makes an advisory report, he disposes of the application, either by granting or denying a discharge; the District Judge has been relieved of the exercise of an independent judgment to grant or deny discharge. C. C. H. describes this amendment as "Elimination of Circumlocution".

The amendment of Section 38 by the addition of Clause 4 investing the Referee with the power to grant or deny a discharge, theretofore exercised by the District Judge, expressly limited the jurisdiction of the District Judge and the Circuit Court to that of "a review", such as exercised by an Appellate Court.

Had Congress intended that the District Judge and the Circuit Court were to be free from the strictures commonly applicable to review of disputed questions of fact, and to authorize those Courts to consider *de novo* petitioner's application for discharge, as in the case at bar, Congress would have said so; it did not. Compare *U. S. ex rel. TVA* v. *Powelson,* U. S. Sup. Ct. Law Ed. Advance Opinion Vol. 87, No. 15, pages 976, 980, not officially reported. Congress "invested" the "Referees", "subject always to a review by the judge, with jurisdiction to * * * (4) grant, deny or revoke discharge". (11 U. S. C. A. 66.) "The Congressional power to ordain and establish inferior courts includes the power "of investing them with jurisdiction limited, concurrent or exclusive". (*Lockerty* v. *Phillips,* U. S. Sup. Ct. Law Ed. Advance Opinion Vol. 87, No. 15, p. 958, at 961.)

"The record may be such as to sustain either a negative or positive finding * * * The judicial function is exhausted where there is found a rational basis for the conclusions * * * after a fair and adequate hearing". In this language, Mr. Justice Rutledge, then a Circuit Judge, described the function of a reviewing Court in *American Gas* v. *Securities & Exchange Commission,* 134 Fed. (2d) 633 at 641.

The instant Referee heard the testimony. He observed the witnesses. Neither the Circuit Court nor the District Judge had those opportunities. The Referee was therefore in a superior position to rationalize upon the facts.

There was substantial evidence to support the Referee's conclusion favorable to petitioner. That conclusion is an inference of fact which may not be set aside upon judicial review because the Court would have drawn a different inference (*National Labor Rel. Bd.* v. *Southern Bell T & T Co.*, decided by this Court May 3, 1943. Law Ed. Adv. Opin. Vol. 87, p. 884). The Referee's reasons for his conclusion are contained in his opinion (R. 18-22). This constitutes his findings of fact. *Institutional Investors* v. *Chicago,* decided by this Court L. Ed. Adv. Opin. Vol. 87, p. 687.

Under applicable principles governing scope "to a review" the Referee's findings and conclusions, here supported by substantial evidence, are conclusive on the District Judge and on the Circuit Court. (*Virginia Electric & Power Co.* v. *National Relations Labor Board,* decided by this Court on June 7, 1943 (Law Ed. Advance Opinion Vol. 87, p. 1135).)

The error of the Courts below is bottomed on their incorrect conclusion that with the District Judge rests the primary duty to grant or deny a discharge.

That the Circuit Court, at bar, did not consider or give effect to the 1938 amendments to the Bankruptcy Act, is clear from its statement:

> "That the District Court had the power to reverse the decision of the Referee on the evidence cannot be doubted. In re Kearney 2 Cir. 116 F. (2) 899; In re Michel 2 Cir. 56 F. (2) 15."

In the *Kearney* case, Circuit Judge Clark, in his dissent, said (116 Fed. (2nd) at 900):

> "Bankruptcy General Order 47, 11 U. S. C. A. following section 53, provides—as does Federal Rule 53 (e) (2), 28 U. S. C. A. following Section 723c—that the judge 'shall' accept the findings of fact of a referee or master 'unless clearly erroneous.' These rules are not rendered inapplicable by the failure of the trial court to heed their mandate. In re Connecticut Co., 2 Cir., 107 F. 2d 734. * * * "

Quite apart from the 1938 amendment of the Bankruptcy Act, Bankruptcy General Order 47 and Rule 53 (e) (2) of the Rules of Civil Procedure require that the Circuit Court and the District Judge shall accept the findings of fact of a Referee "unless clearly erroneous".

Neither of the lower Courts found either, that the Referee's findings were "clearly erroneous" (compare *Goldstein* v. *Polakoff,* 135 Fed. (2) 45), or, that the surrounding circumstances contradict the testimony of petitioner as *In re Michel,* 56 Fed. (2d) 15 cited by the Circuit Court and decided prior to the 1938 amendment of the Bankruptcy Act.

The Circuit Court said that it had before it "the same question to determine here" as it had decided in *Morris Plan Industrial Bank* v. *Henderson,* 131 Fed. (2d) 975. There, it reversed an order of the District Judge setting aside a bankruptcy discharge allowed by the Referee, and said at page 977:

> "* * * we have again and again held that except in plain cases he (the District Judge) should accept the Referee's findings * * *
>
> That being true, we cannot see any adequate reason for refusing to accept the Referee's findings upon the first objection."

"There has been a growing tendency in the direction of liberality in favor of a bankrupt's discharge, and it has come to be recognized that the provisions of the law relating to discharge are not to be construed against a bankrupt, and if his discharge is to be denied it must be because there has been strict proof of the existence of some one of the bars which the statute has set up against the discharge." (*In re Grath*, 36 Fed. 41-42 C. C. A. 7th.)

The Circuit Court and the District Judge erred in setting aside the discharge granted to petitioner by the Referee.

POINT II.

The petitioner kept and produced before the Referee such books of accounts and records as would show his professional transactions of a business nature and his financial condition from such transactions to the extent required by Section 14(c) (2) of the Bankruptcy Act. The Courts below erred in holding otherwise.

Baily v. *Ballance*, 4 Cir. 123 Fed. (2d) 352;
Hedges v. *Bushnell*, 10 Cir. 106 Fed. (2d) 979, 982;
Anderson v. *Haddonfield National Bank*, 3 Cir. 94 Fed. (2d) 721;
International Shoe Co. v. *Lewine*, 5 Cir. 68 Fed. (2d) 517.

The Second Circuit affirmance at bar, is in conflict with the other Circuits.

The rule is clearly stated in the *Hedges* v. *Bushnell* case, *supra*, as follows at page 982:

> "Here the bankrupt kept and preserved some records * * * But the Statute does not exact or concern itself with any particular form of books or records. An impeccable system of bookkeeping which would meet

> with the approval of a skilled accountant or records so complete that they would satisfy an expert in business is not required as a prerequisite to discharge. * * * Taking into consideration * * * the kind and extent of business operated, and the absence of evidence satisfactorily showing bad faith, we think the failure to keep books of account and the failure to keep more complete and detailed records was satisfactorily explained".

The Referee found that petitioner's books and records satisfied the statutory requirement (R. 20-21). For the reasons previously set forth, the Courts below were not free to reject the Referee's conclusion. The action of the Courts below in setting aside the discharge to petitioner is in contravention with the Congressional mandate which requires a discharge in Bankruptcy to petitioner under the circumstances herein set forth.

CONCLUSION

The petition for a writ of certiorari should be granted.

This case involves matter of importance which should be reviewed by this Court, and a writ of certiorari should issue for that purpose as prayed for in the foregoing petition.

Respectfully submitted,

JOSEPH NEMEROV,
Counsel for Petitioner.

MAURICE J. DIX,
GEORGE GUSSAROFF,
Of Counsel.

APPENDIX.

CHASE, *Circuit Judge*:

The bankrupt filed his voluntary petition in the District Court for the Southern District of New York on March 29, 1940 and was adjudicated on the same day. Among those who filed claims in the bankruptcy proceedings was his wife, the appellee, who is living apart from him under a decree of separation granted in the courts of the state of New York. In due course his application for discharge was made and heard before a referee. At that time his wife filed several specifications of objection of which only two now require notice. One of these charged that the bankrupt had falsely testified under oath in the bankruptcy proceedings and another that, with intent to conceal his financial condition, he had failed to keep records and books of account from which such condition might be ascertained.

After hearing, the referee decided that neither specification had been sustained and granted the discharge. Upon review of the referee's order by the district judge there was a reversal as to the two specifications above mentioned and an order was entered denying a discharge. It is from this order that the bankrupt has appealed.

That the District Court had the power to reverse the decision of the referee on the evidence cannot be doubted. *In re Kearney,* 116 F. (2) 899 (C. C. A. 2); *In re Michel,* 56 F. (2) 15 (C. C. A. 2). Whether the power is properly exercised in any particular case depends of course upon the circumstances and that requires attention to the facts as shown by the record on this appeal. *Morris Plan Industrial Bank* v. *Henderson,* 131 F. (2) 975.

It was shown that the bankrupt is the leader of an orchestra who for some considerable time before the petition in bankruptcy was filed, had been broadcasting with his orchestra under contracts which gave him the following gross income. Under one of these contracts dated February

20, 1939, he was paid $1050. a week for five weeks; under another dated April 13, 1939, he was paid $1250. a week for seven weeks; under another dated August 31, 1939, he was paid $1000. a week for seventeen weeks. During the period from January 1, 1940, to March 25, in the same year and but four days before the petition in bankruptcy was filed the bankrupt broadcasted with his orchestra once each week for thirteen weeks for which he was paid $1000. the first week and $1200. each week thereafter. The increase to $1200. a week became effective on January 8, 1940, and all payments due him were made to his personal manager, a man by the name of Wilson. Out of his gross income above set forth the bankrupt had to pay the expenses of his orchestra, including the salaries of its members, who averaged from sixteen to nineteen persons during the period.

It was shown that the bankrupt's gross income from January 24, 1939 to March 25, 1940 had been $48,110. That during this time he had kept no books of account and no records except some check stubs which however failed in large part to show what had become of such of his money as he deposited in his checking account.

He succeeded in explaining to the satisfaction of the referee his failure to keep records which did disclose his financial status by showing that his manager Wilson, and managers he had had before Wilson, kept books of account showing what payments had been made by them to him and what they had done with other money belonging to him which had come into their possession. This explanation was not accepted by the district judge and we think the latter had ample reason for declining to accept it. The statute provides that where an objecting-creditor shows reasonable cause to believe that a bankrupt has violated a provision of the act which will bar his discharge the burden is upon the bankrupt to explain. Here there was no explanation showing what had become of sizable sums which the bank-

rupt received. It appeared that while Wilson was receiving what was due the bankrupt for broadcasting, he was turning over $250. a week to the bankrupt under what was called a guarantee of that amount. It may be that a man who with his orchestra did a business which brought him a gross income of something like $50,000. a year could safely rely on the books of someone else in doing his business. But when he is found seeking a discharge in bankruptcy and he faces the handicap of being without books or records to show his financial status his only remedy is one of explanation. He apparently resented being called upon to explain what he did with his money and this attitude may have been a contributing factor in his failure to justify his lack of financial records and books of account. However that may be, his failure too clearly appears from this record for us to have any fair doubt that the district judge had ample ground upon which to base his decision contrary to that of the referee. We have the same question to determine here. *Morris Plan Industrial Bank* v. *Henderson, supra.* And we have reached the same result.

As this specification was properly sustained and that is enough to require an affirmance of the order we find it unnecessary to determine whether there was enough to sustain the additional ground relied on below for the denial of the discharge.

Order affirmed.

(15)

Folk

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1943

No. 173

FREDDIE RICH,

Petitioner,

vs.

EULA MARLENE RICH,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

EULA MARLENE RICH,
Respondent in person.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1943

FREDDIE RICH,

Petitioner

vs.

EULA MARLENE RICH,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Opinions Below.

The opinion and findings of the Referee may be found in the printed section of the transcript of the record used in the Circuit Court of Appeals. (Rec. 17-20)

The opinion of the District Court may be found in the printed section of the transcript of the record. (Rec. 144-148)

The opinion of the United States Circuit Court of Appeals is reported at 134 Fed. (2d) 779.

Jurisdiction.

The judgment of the United States Circuit Court of Appeals was entered on Oct. 29,1941 (Rec.). Note: Copy of record served on respondent does not contain judgment of the Circuit Court of Appeals.)

The petition for a writ of certiorari was filed on July 19,1943.

The jurisdiction of this Court to review the order of the Circuit Court of Appeals for the Second Circuit is invoked under Section 240 (2) of the Judicial Code as amended by Act of Congress Feb. 13,1925. (28 U. S. C. A. 347 (2).

Question Presented.

The question presented is whether Section 38 of the Bankruptcy Act, as amended by Act of Congress June 22nd, 1938, by theaddition of Clause 4 (11 U. S. C. A. 66), permits either the District Judge or the Circuit Court to set aside a discharge in bankruptcy granted by a Referee, in the absence of a finding that the Referee's conclusion was "clearly erroneous"?

Summary of Argument.

The District Judge did not err in setting aside the discharge in bankruptcy granted petitioner by the Referee in the exercise of the jurisdiction vested in the Referee under the Bankruptcy Act as amended in 1938; nor did the Circuit Court of Appeals err in affirming the judgment of the District Court.

The petitioner failed to keep books of account or records from which his financial condition and business transactions might be ascertained, which failure was not justified under all the circumstances.

No special or important reasons exist for certiorari.

SUMMARY STATEMENT OF MATTER INVOLVED.

Petitioner filed a voluntary petition in bankruptcy on March 29,1940. (R.18).

Petitioner and respondent are husband and wife, separated by a decree of the Supreme Court of the State of New York, which was unanimously affirmed by the Appellate Division,First Department, of the Supreme Court of the State of New York.

Respondent's claim is in the amount of $14,079.67, consisting of moneys loaned by respondent to petitioner (R. 3) Alimony at the rate of $100 in cash per month is at present being paid; in addition thereto respondent is permitted to withdraw $50 per month from an arrest bond which the petitioner had been required to post to safe guard respondent should petitioner again leave the jurisdiction of the State of New York, and again flout the decree of the court.

Although the petitioner listed in his schedules liabilities in the amount of approximately $30,181, of which amount $3,181 was Federal income taxes, there was only one other creditor who filed a claim, which was in the amount of $1,635, which creditor was represented by the Trustee. There were proceedings to remove the Trustee on July 23,1940, which motion was denied by the Referee. Counsel for the Trustee closed the adjourned first meeting of creditors abruptly while Objecting Creditor's (Respondent herein) attorney was in the process of examining the bankrupt, and advised

said attorney that he intended to proceed no further in the matter. Thereafter, the Trustee showed no interest and performed no services as Trustee other than objecting to the motion for his removal.

Specifications of Objections to the discharge of the bankrupt were filed by Chadbourne, Hunt, Jaeckel & Brown, attorneys for respondent, on the 27th day of September 1943. Respondent relieved said firm on Feb. 5,1941 - (they did not withdraw as stated in the Referee's opinion), and has conducted said proceedings in person since that date before the Referee; in the United States District Court on the petition to review, and in the United States Circuit Court of Appeals.

The petitioner was represented of record by three different attorneys: Harry John Gluskin for a certain time; thereafter by David A.Richardson, who ceased to be his attorney on March 8th,1941, and by his present attorney, Joseph Nemerov.

This is the second time the bankrupt has gone through bankruptcy; he filed a petition in 1928 and was discharged in October 1930.

The Referee found that none of the objections had been sustained (Rec, 20-22). The United States District Court reversed the Referee and sustained the first and fourth specifications.

The Referee said in reference to the fourth specification (false oath) (Rec. 21) as follows:

> "It does appear that the bankrupt, apparently laboring under emotion, failed to remember certain matters concerning which he was questioned, but an examination of all the testimony in the proceedings will disclose that subsequently particulars were given."

The District Court in its opinion said: (Rec.147)

> "And so it went on, an utter disregard for the truth, and in an obvious attempt to conceal what he could by any testimony which might in some way discover hidden assets or find out what had become of the large sums of money obviously received by this man during the year and one-half preceding his bankruptcy. The attempt to excuse this by the statement that because the bankrupt was 'Laboring under emotion' he failed to remember certain matters concerning which he was questioned seems to me abortive. (Underscoring mine).

The Referee with reference to the first specification said as follows: (Rec. 20).

> "During a considerable period of time he was represented by one agency which guaranteed to him $250 a week, personally, and who undertook to make such payment whether the bankrupt was engaged in broadcasting or not, or in conducting or not, and the agency arranged to pay the musicians and attend to the other details and to keep for itself any amount over and above the payment made and guaranteed to the bankrupt personally, there being a provision, however, that in the event that the amount exceeded $30,000, that the overplus was to be divided between the bankrupt and the agency."

That there was manifest error and an abuse of discretion on the part of the Referee is clearly proved by the above extract from his memorandum opinion, which shows he did not grasp the whole testimony in that after his "careful examination of all the testimony", he definitely had two contracts confused, said contracts being Objecting Creditor's Exhibit 7 (Rec.139-140) and

Objecting Crediter's Exhibit 1 (Rec. 108-111.) Objecting Crediter's Exhibit 7 is an agreement between Roy Wilson and the bankrupt, dated Dec. 4,1939, and covered the extended period of the contract, which extended period was provided for by an option under Objecting Crediter's Exhibit 5 (Rec.136, f. 406), which was from Jan. 1,1940 to March 25,1940. The salary of $1000 per week provided for in this option was increased to $1200 per week, effective January 8,1940 (Rec.138). Said Exhibit 7 is the only contract wherein the agent agrees to pay the musicians and other expenses of orchestra and in return guarantees the bankrupt $250 net salary weekly during the extended period of the contract, which was for thirteen weeks, and further provides that after paying the musicians and expenses, together with petitioner's salary of $250 per week, said Wilson was to retain the balance as hisown compensation. Further said contract between Wilson and the bankrupt had no clause therein whereby all amounts received by petitioner over $30,000 were to be divided between Wilson and the bankrupt. Neither did said contract have a clause therein whereby Wilson undertook or agreed to pay him $250 a week whether he worked or not. Contrary to the Referee's findings, this contract was not for a considerable period of the time - it was for thirteen weeks, but said Wilson only signed checks in payment of services of the orchestra for the last two weeks. The total broadcasts covered forty-two weeks.

Objecting Crediter's Exhibit 1, between The Milrich Corporation and the bankrupt, (Rec. 108-111) is the contract which guarantees to pay the bankrupt $250 a week whether he worked or not, which contract is dated May 12,1938, and according to the bankrupt's testimony (Rec. 38) under this contract all sums received in excess of $30,000 were to be divided equally between the bankrupt and said Milrich Corporation, yet the contract recites 50% of all sums received by employer for services of artist (bankrupt) in excess of $10,000. This contract (Exhibit 1) does not provide that the agent shall pay the musicians; in fact, there is no evidence in the record at any point as to what services were performed by the bankrupt under said contract.

This outstanding example of the Referee's failure to summarize the evidence at the one and only point at which he attempts a summarization is substantiated and proven beyond a doubt by his memorandum, the evidence and the contracts themselves. The Referee stated in his opinion: "The testimony does not lend itself easily to summary". As is shown, his memorandum opinion is based on an inaccurate summary of the evidence and record. The Referee also stated (Rec 21) "especially in view of the fact that the details were available in the books of his representatives." The evidence and records show that the details were not available in the books of his representatives.

As will be seen from the Referee's memorandum opinion, and

particularly in reference to the Fourth specification, he did not attempt to reconcile in any way flagrant inconsistencies and essentially incredible evidence on behalf of bankrupt. Re Michel, 56 Fed. (2d) 14, CCA 2nd Cir.

Contrary to the statement on page 2 of petitioner's brief that the referee was present and heard all the testimony, it is not a fact. The Referee was not present when the Trustee closed the adjourned first meeting; he was not present at any of the examinations of the bankrupt under Section 21-A of the Bankruptcy Act, nor at the examination of Mr. Dudley of Ruthrauff & Ryan under 21-A. He did hear the testimony of petitioner's agent, Wilson, under 21-A and was present at the hearings on the specifications of objections.

In reference to the first specification the District Court said: (See.147).

"A reading of the whole testimony shows to my mind an obvious attempt on the part of the bankrupt to avoid revealing what had become of his large earnings and an obvious attempt to secrete them. I cannot but believe that when he started with Wilson in the early part of 1940 and about three months before he filed his petition, his every effort was to so involve his financial transactions that he would have a nice sum placed away for a rainy day and since the bankruptcy, he has been withdrawing this rainy day fund in the guise of loans fromWilson."

At Record 146, the District Court further said:

"**it is not possible to ascertain his financial condition and business transactions for two years prior to the date of filing of his petition, nor can I see how such failure can be justified under all the circumstances shown."

The United States Circuit Court of Appeals said:

"This explanation was not accepted by the District Judge, and we think the latter had ample reason for declining to accept it. The statute provides that where an objecting creditor shows reasonable cause to believe that a bankrupt has violated a provision of the act which will bar his discharge, the burden is upon the bankrupt to explain. Here there was no explanation showing what had become of sizeable sums which the bankrupt received." (Rec. 159)

******

"*** his failure too clearly appears from this record for us to have any fair doubt that the District Judge had ample ground upon which tobase his decision contrary to that of the referee." (Rec.160).

** ****

"As this specification was properly sustained and that is enough to require an affirmance of the order, we find it unnecessary to determine whether there was enough to sustain the additional g round relied on below for the denial of the discharge." (Rec. 160).

(See next page)

COUNTER-STATEMENT OF FACTS.

(a) Insufficiencies and inaccuracies in petitioner's Statement of Facts.

The petitioner is an orchestra leader. He conducted an orchestra on a commercial program on the air sponsored by Quaker Oats Co. for a total of forty-two weeks. Said forty-two weeks, instead of being covered by "a written employment contract", as stated in petitioner's brief, were covered by three contracts, and the exercise of an option under one of said contracts. Said contracts were between petitioner and Ruthrauff & Ryan, - said Ruthrauff and Ryan represented the Quaker Oats Co. (Rec. 116-117). Said option wasfor the last 13 weeks under Objecting Creditor's Exhibit 5 (Rec. 136), which salary of $1000 under the option was increased to $1200 by memorandum. (Rec. 138).

Said Ruthrauff & Ryan sent checks in payment of petitioner's services, after making deductions for Federal and State Unemployment and Old Age pension taxes, to petitioner's respective agents.

Petitioner's brief would lead the court to believe that petitioner had one agent or representative during the period of forty-two weeks. On the contrary, while he had one sponsor on this program, the Quaker Oats Company, petitioner had three different agents during these forty-two weeks.

Under Objecting Creditor's Exhibit 3, checks in payment of petitioner's services were sent to Rockwell & O'Keefe, petitioner's agent for five weeks. (Rec. 116-117)/

Under Objecting Creditor's Exhibits 4 and 5, checks in payment of petitioner's services were sent to the Music Corporation of America, petitioner's agent- period 24 weeks. (Rec. 122-127)

Under option (Rec. 136) exercised under Objecting Creditor's Exhibit 5, which salary was increased from $1000 per week to $1200 per week (Rec. 138),checks in payment of petitioner's services were sent to Roy Wilson, (Rec. 139), pursuant to contract with said Wilson. (Rec. 139).

There was testimony as to amounts sent to Rockwell & O'Keefe and the Music Corporation of America for petitioner's services, but there was no testimony or records showing what amounts, if any, said Rockwell & O'Keefe and the Music Corporation of America turned over to petitioner for his services.

No disposition was shown either of the gross or net income received by petitioner under Exhibits 3, 4 and 5. There was no testimony as to whether or not said Rockwell & O'Keefe and the Music Corporation of America ever agreed to pay petitioner's musicians.

Petitioner's brief states at page 4 "that petitioner surrendered all the records in his possession, including his employment contracts with radio sponsor and with his agent," This is incorrect. Petitioner produced employment contracts with Ruthrauff & Ryan, referred to as Exhibits 3 4, and 5. Petitioner did not produce his contract with the Music Corporation of America, who acted as his agent for a period of twenty-four

weeks. There was no contract produced by petitioner with his agent, Rockwell & O'Keefe, who acted as his agent for five weeks.

Petitioner produced a contract between himself and Roy Wilson, covering the last 13 broadcasts, for twelve of which broadcasts petitioner received $1200 per week. Contrary to statement in petitioner's brief (page 3) that petitioner's representative paid all expenses of the broadcasts, said Wilson never signed any checks in payment of petitioner's musicians, as provided in the contract (Rec. 139) until the last two broadcasts, which moneys became due and payable to petitioner on March 29,1940, date he filed his petition, and on April 5th,thereafter. Prior to the last two broadcasts petitioner signed checks on his own bank account in payment of his musicians and the other expenses. Previous to said last two broadcasts, Wilson merely figured out what was his personal compensation and deducted that amount from the check made payable to him (Wilson) for petitioner's services, and gave a check for the balance to petitioner, from which amount or out of which amount petitioner signed his own checks on his own bank account in payment of musicians and other items.

Petitioner's brief states that "the net remaining after these deductions was paid over to petitioner as his personal compensation", The record does not show this. See Rec. 93 to 98 inclusive.)

Petitioner furnished no bank books or checks stubs, although he had two accounts with the Underwriter's Trust Company, a checking account and a special account.(Rec.Last 3 pages of 21-a testimony.)

Petitioner's former attorney, who had previously represented him in the bankruptcy proceedings testified (Rec. 69) that he had in his possession cancelled checks for the checking account for the months of September, October, November and December 1939, and statements for those months. He did not know if they were the complete checks for those months or not. The checking account was in existence twelve months.(Rec. Last 3 pages of 21-a testimony). Said attorney had no knowledge of a special account, and had no cancelled checks for that account. He had no bank book or check stubs in his possession for either account. This testimony appears at 21-a, pages 38-39, and at Rec. 63, 64 and 65.

The only contract petitioner furnished with any agent was the contract with Roy Wilson (Rec. 139-140) who acted as his agent for the last 12 weeks. The testimony that was given as to payments to petitioner by said Wilson and also as to payments to musicians, was read from a check book by said Wilson. No checks or records to substantiate these figures were produced except photostatic copies of the face of checks in payment of musicians and other items for the last twobroadcasts.

Contrary to statement on page 4 of petitioner's brief that these receipts and disbursements are recorded in petitioner's books and records, said Wilson testified as to said amounts. Petitioner produced no records except the contracts with Ruthrauff & Ryan and a contract with one agent, Roy Wilson, for the last 12 weeks, as to these Quaker Oats programs. It was contended by petitioner throughout that petitioner's transactions were shown in the books of his agent.

There was a contract furnished between the Milrich Corporation and petitioner (Rec. 108-111), and a cancellation contract thereof (Rec. 113-115). However, there were no checks or records to substantiate any of the testimony as to payments made under thisMilrich contract, and petitioner's testimony as to the amount that was to be split fifty-fifty did not correspond to that mentioned in the contract.

The other insufficiencies and omissions in his Statement of Facts are set out in Respondent's Statement of Facts.

THE FACTS.

(b) As indicated above the petitioner's statement of facts is so insufficient as to require my restatement, avoiding, of course, the repetition of those parts of the statement which are not disputed, and repeating only where it is necessary for the sake of sequence.

Petitioner's gross income from January 24,1939 to March 25,1940, a period of one year and two months was $48,110.

Petitioner filed his voluntary petition in bankruptcy on March 29,1940, just four days after he made his last broadcast on the Quaker Oats program referred to in Section (a) above, at a salary of $1200 per week, and before the moneys in payment of the last two broadcasts were due and payable. Petitioner asked for and received from his agent an advance on March 15th of three weeks salaryfor March 11th, 17th and 25th broadcasts.(Rec. 97-98); $250 of which would otherwise have been due and payable to petitioner on March 29th, date he filed his petition in bankruptcy and $250 on April 5 th,1940, after he filed his petition.

Petitioner had one sponsor, who was represented by Ruthrauff & Ryan; he produced contracts with said Ruthrauff & Ryan showing his engagements for the 42 weeks, which are set out heretofore under (a) in this brief. (Rec. 116-137). During said forty-two weeks, although petitioner had one sponsor, he had three different agents. The only contract produced with an agent was the one with Roy Wilson (Rec. 139-140) for the last 13 weeks. However, checks for petitioner's services were not sent to said Wilson until the second broadcast under said contract, which was simultaneously with the increase in salary from $1000 to $1200 per week. The provision of said contract as to payment to musicians by said agent was not put into effect until the last two broadcasts. Just three months before petitioner filed his petition in bankruptcy, he changed agents, and produced said contract with him. (Rec.139). Said contract provided "that all expenses in connection with the program, such as payments to musicians, arrangers, copyists, librarians, etc. shall be paid directly by me, and any surplus left over shall represent my full compensation." See paragraphs marked (1) and (2) of said contract (Rec. 139). Although said contract contained said provision, said petitioner signed his own checks on his own bank account in payment of musicians and other items mentioned up to and until the last two broadcasts. (Rec. 96 to 98). Said agent only signed checks for the last two broadcasts. Previous to the last two broadcasts said agent merely deducted what he figured was coming to him over and above expenses of orchestra, guarantee to Rich of $250 and other items set out in record and made a check out payable to petitioner for the balance, out of which petitioner signed his own checks on

his own bank account in payment of said items. The testimony of Wilson (Rec. 93 to 99) when itemized, shows the amount received by Wilson for his personal compensation was $2832.10. This in addition to the 10% commission paid his firm, or $1200, amounted to $4032.10, or 28% commission paid by petitioner for the period of the last 12 broadcasts. Petitioner testified that he had paid the Music Corporation of America 10% commission (Rec. 57-58), who had acted as his agent for twenty-four weeks under contracts at Rec. 122 to 129, which was just previous to petitioner entering into this contract with Wilson as his agent, and just twelve weeks before he filed his petition in bankruptcy.

No checks or records were produced to substantiate evidence or amounts, except photostatic copies of face of checks for the last two broadcasts.

Wilson testified he had been financing the petitioner since the filing of his petition in bankruptcy, taking no note or security for said advances. During April, May, June and August 1940 Wilson had loaned petitioner a total of $1500. (Rec.101,) taking no notes for advances. Petitioner had filed his petition on March 29,1940. Petitioner borrowed $800 of the above amount in August (Rec. 101) immediately following the closing of the 21-A examinations on July 30,1940. Wilson testified that he had previously loaned the bankrupt $2000, which made the bankrupt indebted to him in the sum of $3550. (Rec. 101). The petitioner

said he gave Wilson no note for the $2000 (Rec. 15); Wilson said he did and produced the note (Rec.102). Petitioner had made no payment on account of this $2000. (Rec. 103); petitioner did not list said debt of $2000 to Wilson in his schedules in bankruptcy, neither did said Wilson file a claim for said amount.

Petitioner produced no contract with his agent, Rockwell & O'Keefe, to whom a check was sent for petitioner's services for the first five broadcasts.

Petitioner produced no contract with his agent, Music Corporation of America, to whom a check was sent for petitioner's services for twenty-four weeks. Testimony as to the contract with the Music Corporation of America appears at Record 58.

There is no testimony in the record, or any records or checks to show what amount, if any, either Rockwell & O'Keefe or the Music Corporation of America ever turned over to petitioner for his services for a total of 29 weeks (Rockwell & O'Keefe represented him for five weeks and said Music Corporation for twenty-four weeks), and there is nothing to show whether or not these agents ever agreed to pay petitioner's musicians and other items in connection therewith. There was nothing to show that this system petitioner attempted to put in effect with said Wilson was persisted in throughout the period of the forty-two broadcasts.

No disposition either of the gross or net income received

for the five broadcasts during which Rockwell & O'Keefe acted as his agent was shown.

No disposition either of the gross or net income received from the twenty-four broadcasts during the time the Music Corporation of America acted as his agent, to whom he paid 10% commission, was ever shown in either the books of petitioner or in the books of his representatives.

Under option (Rec. 136) exercised under said Exhibit 5, (Rec. 128-137) - salary increased by memo from $1000 to $1200 per week (Rec. 138), disposition of gross income for twelve weeks was shown by testimony; the only checks produced to substantiate this testimony was photostatic copies of face of checks for the last twobroadcasts. There were large amounts paid out to arrangers and copyists, as high as $227.50 per week, yet there were no checks or records to substantiate this testimony, and there was much conflicting testimony as to who really did pay for the arrangements, Ruthrauff & Ryan or petitioner. (Rec. 21a Nov. 22,1940. p. 12 and 13; Rec. 82 to 86). No disposition of the net income for this thirteen weeks was ever shown.

In addition to the income received from the above mentioned contracts re the Quaker Oats program, petitioner received $2500 under a cancellation contract between the Milrich Corporation and petitioner (Rec. 113-115) of a contract between same parties (Rec.108-111). No checks or records were produced to substantiate this testimony, or amounts received under the contract of cancellation. Neither was there any testimony as to what services petitionerhad performed under this contract and the disposition of moneys received thereunder.

Petitioner also received payment for services performed for Columbia Artists Bureau from Feb. 23,1936 to April 26,1938(Rec.7)

Petitioner also received payment for services performed for Associated Music Publishers and Columbia Recording Company in 1939 (21-a July 18,1940, p. 6)(Rec 7). The petitioner waspaid by Ruthrauff & Ryan $11,000 in 1936 (21-a Nov. 22,1940) and $10,657 in 1937 (Rec. 73, f 217); he also made records for Decca Recording Company in the spring of 1938 (Rec. 21-a p. 51); he received from Paramount (movie concern) $2500 in 1937 for making a short for the movie (21-A p. 49-50, July 30,1940); also made a short for Warner Bros. (21-a pp.49-50); but no records were produced therefor. Bankrupt testified that he did not have any books or records; that he never had any that he knew of (R.64); that although he had a secretary, she never kept track either of his income or of his expenses; that he never kept any books (Rec. 64-65); that he kept track of how much money he had in a year in his mind and made the same record of his expenses (Rec.65.)

Petitioner borrowed in 1937 $6000 from the Marine Midland Trust Co. (21-a p.11-12. He also borrowed $6000 from a California law firm in April 1939 (21-a 31). He testified he gave said law firm "no note, no collateral no anything, just a promise to repay" (21-A p. 31) Said law firm is listed in petitioner's schedule, but said firm filed no claim for any amount.

From May 1938 to January 24,1939, which period is within a year and one half and two year period preceding the filing of his petition in bankruptcy, petitioner disclosed no income whatever, although he lived in Beverly Hills, California, in a two story brick house in an exclusive neighborhood with garage on same lot

and employed a Japanese cook (Rec. 30) (21-a, p. 20-22 July 18,1940. He testified he kept the money with which he paid his expenses with from May 13,1938 to Jan. 24,1939 in his pocket. (21-a p. 22, July 18,1940.)

Petitioner could not remember when last he had a bank account nor if he had one in 1939 or when the bank account was closed.(Rec. 33). Finally testified he had no other account than the checking account. (Rec.61). The Underwriter's Trust Company testified his checking account was closed March 30,1940; that he had two bank accounts, a special account and a checking account; checking account was from April 27,1939 to March 30, 1940; the special account was from April 19,1939 to July 28, 1939. (21a testimony of Harry W. Gooch, last three pages not numbered) On examination of petitioner on specifications of objections he said his former attorney who had previously represented him in the bankruptcy matter was holding his cancelled checks. (Rec. 63 to 65). Respondent subpoenaed said attorney and he testified as set out under Section (2) of this brief. However, said checks for said four months were not allowed to be examined or marked as exhibits. Petitioner testified his salary from Jan. 1,1940 to March 28,1940 was $1000 per week(Rec.55); again at Rec. 54 he testified his salary for that period was $1000 per week. After Objecting creditor attempted to introduce the memo showing that his salary was $1200 for that period, he acknowledged it. (Record 54).

Petitioner produced the following insurance policies:

One policy of $6000, beneficiary, Elizabeth Gordon, insured's friend (21a p. 12-14)

One policy of $10,000; beneficiary Rose Cohen, sister, (21-a p. 8);

One policy of $750; beneficiary Rose Cohen, sister, (21-a p. 15)

The testimony shows much contradictory testimony, which cannot be set out here.

(See next page).

POINT I.

THE DISTRICT COURT DID NOT ERR IN SETTING ASIDE THE DISCHARGE IN BANKRUPTCY GRANTED TO THE PETITIONER BY THE REFEREE, AND THE CIRCUIT COURT OF APPEALS DID NOT ERR IN AFFIRMING THE JUDGMENT OF THE DISTRICT COURT.

By Act of Congress of June 22,1938, substantial changes were made in the Bankruptcy Act.

This petition for certiorari does not require consideration and construction of amendments dealing with theReferee's powers and functions in connection therewith.

Section 38 of the Bankruptcy Act, as amended in 1938, with the addition of Clause 4,(11 U. S. C. A. 66) provides:

> "Referees are hereby vested, subject always to a review by the judge, with jurisdiction to ** (4) grant, deny or revoke discharge."

Concedly, this new authority vested in the Referees by the amendment of Section 38 by adding clause 4, made the referee a court for that purpose.

In the instant case, the referee, not the judge, heard and determined the bankrupt's application for a discharge.

The referee exercised the authority vested in him under Section 38, Clause (4), by granting the bankrupt his discharge. (Rec. 23-24).

But the petitioner has overlooked the fact that this new jurisdiction given the referees "to grant,deny or revoke discharges" was vested in them "subject always to a review by the judge."

The Report of the House Committee on Judiciary, July 29, 1937 says: (page 10)

> "*** (2) Jurisdiction in discharge *** Section 38, Clause (4) giving referees jurisdiction to grant, deny or revoke discharges ****. The new jurisdiction would, of course, be exercised, subject to review."

This shows clearly that Congress intended that this new jurisdiction vested in the referees by Section 38, Clause 4, should be "subject always to a review by the judge." Not only is the referee's order since the 1938 amendment of Section 38 by adding clause 4 subject to review under General Order 47, but the judge has been given greater latitude in his review.

General Order 47, as amended January 18,1939, effective Feb.13,1938 now provides:

> "and the judge shall accept his findings of fact unless clearly erroneous. The judge after hearing may adopt the report, or may modify it or may reject it in whole or in part, or may receive further evidence or may recommit it with instructions." (11 U. S. C. A following Sec. 53).

Therefore, the scope of the review by the district court of findings made by a referee is established by General Order 47, and Rule 53 (e) (2) of the Rules of Civil Procedure.

The District Court did not consider de novo, with fresh taking of the evidence, petitioner's application for a discharge, as charged in petitioner's petition. The District Court reviewed the instant case on the evidence sent up to it by the referee. Although it had the power under General Order 47 to take further evidence, it did not.

The final order or finding of a referee in bankruptcy is a prequisite to a petition for court review. Re Prindible, CCA 3rd Cir. 116 Fed. (2d) 21, at page 22.

The District Court's reversal of the Referee's findings was in conformity with procedure required under General Order 47. By its opinion ithas shown where its findings are supported by the evidence. That the District Court deemed the referee's findings to be clearly erroneous and wholly unsupported by the evidence is clearly shown by the following findings of the District Court:

In reference to the Fourth Specification as to false oath, it said (Rec.147).

> "And so itwent on, an utter disregard for the truth ** The attempt to excuse this by the statement that because the bankrupt was 'laboring under emotion' he failed to remember certain matters concerning which he was questioned seems to me abortive." (Underscoring mine).

As to the First Specification, the District Court said: (Rec.148).

> "It is not possible to ascertain his financial condition and business transactions for two years prior to the date of the filing of his petition nor can I see how such failure can be deemed justified under the circumstances shown."

Section 14 (c) (2) of the Bankruptcy Act provides that bankrupt shall keep books of account or records, from which his financial condition and business transactions might be ascertained, unless the court deems such acts or failure to have been justified under all the circumstances of the case.

The scope of the review by a Circuit Court of Appeals of a District Court is established by Rule 52 (a) of the Rules of Civil Procedure (28 U.S. C. A. following 723c).

The question before the Circuit Court of Appeals in the instant case was whether or not the District Court was justified in reversing the referee; therefore, a statement by the Circuit Court that the referee was clearly erroneous when it was affirming the District Court's opinion is not required by any statute.

The Circuit Court held that the extent of appellate review on appeal from the District Court's order reversing referee's order whereby bankrupt was granted his discharge was the same as on District Court's review of referee's order.

Morris Plan Industrial Bank v. Henderson, CCA 2nd, 131 Fed, (2d) 978.

In the case at bar, in affirming the District Court's opinion, the Circuit Court said:

> "This explanation was not accepted by the district judge and we think the latter had ample reason for declining to accept it.
>
> ****
>
> His failure too clearly appears from this record for us to have any fair doubt that the district judge had ample ground upon which to base his decision contrary to that of the referee. We have the same question here. Morris Plan Industrial Bank vs. Henderson, supra. And we have reached the same result.

Petitioner contends that the lower courts did not say that "the surrounding circumstances contradict the testimony of petitioner", as in Michel, 56 Fed. (2d) 15. The Circuit

Court cited Michel, supra, and In re Kearney, 116 Fed (2d) 899, as cases showing that it could not be doubted that the District Court had the power to reverse the decision of the referee on the evidence. The court not only cited these two cases as upholding the power of the District Court, but it said further:

> "Whether the power is properly exercised in any particular case depends, of course, upon the circumstances and that requires attention to the facts as shown by the record on this appeal. Morris Plan Industrial Bank v. Henderson, 131 Fed. (2d) 978."

In Michel, supra. In this case the evidence was held to sustain objections to bankrupt's discharge because of false oath. The opinion stated:

> "The judge filed a memorandum in which he relied on the fact that the referee had heard the bankrupt testify and that the orderly administration of justice required that a reviewing court should leave a report that involves a question of credibility only undisturbed, but it is plainly not enough that a question of credibility is involved."

In the instant case, it is pointed out that the Circuit Court did not pass on the question of false oath, but only affirmed as to the first specification in regards to books and records, saying:

> "As this specification (1st specification) was properly sustained and that is enough to require an affirmance of the order, we find it unnecessary to determine whether there was enough to sustain the additional ground relied on below for the denial of the discharge.

It is submitted that the question involving adequate books or records to show bankrupt's financial condition and business transactions as required by Section 14c (2) of the Bankruptcy Act, is strictly a matter of whether or not such records were produced, and if not, whether such failure was justified under all the circumstances of the case. Therefore, a statement by the Circuit Court of Appeals "that the surrounding circumstances contradict the testimony" of petitioner, when they did not pass on the question of false oath, is superfluous and not required by any statute.

It is submitted that the District Court in its opinion at pages 146 and 147 has adequately covered the question of contradictory or conflicting testimony and obviously perjurious oath on the part of the bankrupt, which statements are too numerous to quote at this point.

The case of Goldstein vs. Polaskoff, et al, CCA 9th Cir. 135 Fed. (2d) 45, referred to in petitioner's brief, was based on findings of District Court as to documentary evidence and conflicting testimony that the property was not fraudulently transferred by bankrupt to his brother in law. In the case at bar, there was also the question of whether or not records were produced that would show petitioner's financial condition, and the District Court and the Circuit Court were in equally as good a position to pass upon the question as the referee, and particularly so since the referee was not present at all the examinations and also based his findings on an erroneous analysis of the record at the one and only point he attempted a summarization.

Petitioner contends that the District Court erred in setting aside the findings of fact of the Referee. No particular findings of the referee are specified by petitioner. The findings of the referee quoted in petitioner's brief (p.2) are general and might be applied to various bankruptcy cases.

The following finding of the referee is conspicuous by its very absence from their brief: (Rec. 20, f 60).

> "During a considerable period of the time he was represented by one agency which guaranteed to him $250 a week, personally, and who undertook to make such payment whether bankrupt was engaged in broadcasting or not or in conducting or not, and the agency arranged to pay the musicians and attend to the other details and to keep for itself any amount over and above the payment made and guaranteed to the bankrupt personally, there being a provision, however, that in the event that the amount exceeded $30,000, that the overplus was to be divided between the bankrupt and the agency."

Neither does petitioner discuss the sufficiency of the evidence. The above finding of the referee is wholly unsupported by the evidence and record and based upon an erroneous analysis of the records and exhibits, as pointed out in detail by reference to exhibits and testimony in the record under "Summary of Matters Involved, pages 5, 6, 7 of this brief. It is also pointed out therein that the referee did not hear all the testimony. The present attorneys of the petitioner are the third attorneys of record in the bankruptcy proceedings and are not in position to know all the facts.

The petitioner quotes from American Gas v. Securities &

Exhcnage Commission, 134 Fed. (2d) at 641 (page 10 of his brief) as to functions of a reviewing court, the following:

> "*** The judicial function is exhausted where there is found a rational b asis for the conclusions.***"

The District Court and the Circuit Court have shown by their opinions that they found that there was no rational b asis for the conclusions of the referee, which finding is supported by the evidence.

Contrary to petitioner's statement that there has been a growing tendency in the direction of liberality in favor of bankrupt's discharge, one of the purposes of the Chandler Act was to minimize evasions of the bankrupt.

In re Federal Provisions Co. vs. Ershowsky, et al, (CCA 2) 94 Fed. (2d) 574, it was held:

> "The amendment of 1926 has revolutionized the procedure in discharge; the bankrupt may no longer remain inert - let him satisfy the court that it really explains, else he will not be discharged."

In re Marx vs. Garner, et al, (CCA 7th) 125 Fed. (2d) 335, it was held:

> "The bankrupt must now really have the necessary records or explain why the circumstances of the case excuse his failure. By no longer requiring proof of such intent the statute has narrowed the bankrupt's road to the salutory discharge." White vs. Schoenfeld, 117 Fed. (2d) 131-132"

Most of the cases cited in petitioner's brief under Point I have no application to the pending petition, inasmuch as they deal or concern themselves not with bankruptcy reviews, but rather with reviews by the courts of the decisions of non-

judicial administrative bodies, such as the National Labor Relations Board, or with reviews concerning condemnation proceedings, which are not governed by the provisions of the Bankruptcy Act. It is self evident that such cases have no applicability to the instant application, and your respondent accordingly feels it is unnecessary to discuss each of such cases in detail.

Petitions for certiorari were denied in the following cases:

In re MifflinChemical Co. 123 Fed. (2d) 311; 315 U.S. 815.

In re Nix v. Sternberg, 38 Fed. (2d) 611 (CCA 8th Cir); 282 U.S.R. 838.

It is submitted that there are reasonable grounds to believe that this petition for certiorari is a patent attempt to achieve an end other than that which can fairly be said to effectuate the provisions of the Bankruptcy Act.

The District Court did not err in setting aside the discharge granted petitioner by the Referee; neither was there error on the part of the Circuit Court in affirming the District Court.

POINT II

THE BANKRUPT FAILED TO KEEP BOOKS OF ACCOUNTS OR RECORDS FROM WHICH HIS FINANCIAL CONDITION AND BUSINESS TRANSACTIONS MIGHT BE ASCERTAINED.

The petitioner is an orchestra leader. He employed from 16 to 19 musicians and an arranger. Aside from his broadcasts on commercial programs on the air, he had other sources of income, such as electrical transcriptions used on the radio and records, making movie shorts for moving picture producers and furnishing musical scores and music for motion pictures shown on the screen.

On his commercial programs he was reimbursed for certain items paid out by him, such as overtime (Rec. 129) and musical arrangements or copyists (21-a Nov. 22,1940, p. 12-13). There is much contradictory testimony in the record as to who paid for the copying or arrangements, which amounted to as much as $227 a week in some instances. (Rec.92). There is a question of diversion of funds through his agent Wilson, during which time he paid a total of 28% commission when he paid his previous agent only 10%. He incurred liabilities; he borrowed $6000 from the Marine Midland Trust Company in 1937 and $6000 from a California law firm in 1939, and also he had given a note for $2000 to his agent Wilson at a time when said Wilson was not acting as his agent. There was no record kept to show his liabilities, or what amount, if any, had been paid on said indebtedness.

He failed to produce his agency contract with the Music Corporation of America who had acted as his agent for 24 weeks. There is

no testimony in the record to show what amounts were turned over to petitioner for his services by the Music Corporation of America. The contract he furnished with his agent Wilson was for only twelve weeks, and it was not until the last two broadcasts that certain provisions thereof were put into effect. Wilson's testimony was not adequate. No bank books, check stubs or cancelled checks were furnished. The cancelled checks for four months held by his attorney were not allowed to be examined or marked as exhibits; therefore, of what benefit were they in ascertaining his business transactions. NONE WHATEVER.

The Court, In Re Hanna, (CCA 2) 168 Fed. 238, held that Section 14 of the Bankruptcy Act intended to insure the keeping of correct and complete accounts and should be rigidly enforced.

Books and records are material to a proper administration of a bankrupt's assets for a number of reasons. They are required so that they may be checked against the oral statements or explanations made by bankrupt. Matter of Underhill, (CCA 2nd) 86 Fed. (2d) 258. They are necessary to ascertain the dates of insolvency, important in connection with fraudulent transfers or diversion of funds, if any. They are required to serve as a check against unfounded or fictitious claims of alleged creditors; and to check in detail the disposition of the bankrupt's assets. In the absence of intelligible records, it is impossible for

creditors to judge a bankrupt's true financial condition and determine whether the bankruptcy was an honest failure caused by business reverses or an attempt to escape liability without surrender of assets. In re Magen Bros. (CCA 3) 192 Fed. 883.

In the Matter of Underhill, 82 Fed. (2d) 258 (CCA 2), the court stated:

> "Complete disclosure is in every case a condition precedent to the granting of the discharge and if such disclosure is not possible without the keeping of books or records, then the absence of such amounts to that failure to which the act applies.
> Nix v. Sternberg, supra, Karger v. Sandler 68 Fed (2d) 80 (CCA 2) Re Miller, D.C.Md 5 Fed. Supp 913
> The purpose and intent of Section 14b of the Bankruptcy Act is to make the privilege of discharge dependant on a true presentation of the debtor's financial affairs.
> It was never intended that a bankrupt, after failure, should be excused from his indebtedness without showing an honest effort to reflect his entire business and not a part merely. To be sure there may be records, which are not books; but it is intended that there be available written evidence made and preserved from which the present financial condition of the bankrupt and his business transactions for a reasonable period in the past may be ascertained. Records of substantial completeness and accuracy are required so that they may be checked against the mere oral statements or explanations made by the bankrupt. International Shoe vs. Lewine, 68 Fed.(2d) 817-1818 (CCA 8)

The following cases are pertinent to the contention of petitioner and that of Referee "that the details of the bankrupt's transactions were available in the books of his personal representatives;"

In re Muss (CCA 2) 100 Fed (2d) 396, the court held:

> "Assuming that a bankrupt may satisfy his obligations to record his personal transactions by keeping them in books of corporation which he controls, it does not appear that the corporate records the appellant has made available are adequate to show his transactions."

In the instant case, the testimony of petitioner's agent, Wilson, was not adequate.

In re White vs. Schoenfeld, (CCA 2) 117 Fed. (2d) 131, it was held:

> "Perhaps it was true that corporation's records would have shown his transactions just as he said they would, but those books were not his books, and the excuse, if it was an excuse, was for him to make good, the truth being easily available if he was right. He did nothing but give the vaguest oral testimony as to all these transactions and the referee who saw him did not credit him. We cannot see why his word was necessarily conclusive in the absence of confirmation."

See also In re Herzog, (CCA 2) 121 Fed. (2d) 881, which case concerns entries in the same set of books of business transactions carried on by bankrupts as partners and as a corporation. Petition for certiorari was denied. 315 U.S. R., 807.

See also Matter of Northbridge, D.C.N.Y. 55 Fed. (2) 858.

The objecting creditor met and discharged the burden of showing to the satisfaction of the court that there were reasonable grounds for believing that the bankrupt failed to keep books of account or records from which his financial condition and business transactions could be ascertained. The burden then shifted to the bankrupt of showing that such

failure was justified under all the circumstances of the case.

Section 14 (c) of the Bankruptcy Act;
Karger v. Sandler, (CCA 2) 62 Fed. (2d) 80;
Nix v. Sternberg, (CCA 8) 38 Fed. (2d) 611;
M & M. Mfg. Co. (CCA 2) 71 Fed. (2d) 140-142;
Granning, et al (CCA 2) 229 Fed. 370;
Marx v. Garner, et al (CCA 7) 125 Fed. (2d) 335;
White v. Schoenfeld, (CCA 2) 117 Fed. (2d)131;

POINT III

THE FAILURE TO KEEP BOOKS OF ACCOUNT OR RECORDS WAS NOT JUSTIFIED UNDER ALL THE CIRCUMSTANCES.

The failure to produce records from which his financial condition could be ascertained called for an explanation, but none was forthcoming. It is impossible to ascertain his financial condition and business transactions before the bankruptcy. Matter of Krulewitch, D. C. N.Y. 60 Fed. (2d) 1039.

The bankrupt offered no explanation for his failure to keep or produce records that would show his financial condition and business transactions. He made nosttempt to furnish his contract with the Music Corporation of America (Rec.58), who acted as his agent for twenty-four weeks, or to furnish his contract with Rockwell & O'Keefe who acted as his agent for five weeks. He made no attempt to show what amounts said agents turned over to him for his services under the contracts with Ruthrauff& Ryan, or the disposition thereof. (Rec. 116-137).

He made no attempt to show that this system put in operation by him through his contract with said Wilson had been persisted in during the whole period in which he broadcast under the contracts with Ruthrauff & Ryan. The difference in the amount of commission paid the agents is outstanding, and the petitioner failed to give any satisfactory explanation of the same. Even certain of the provisions of the Wilson contract were not put into effect until the last twobroadcasts.

Petitioner made no attempt to show where he got or where he kept the money with which he paid his expenses in California from May 1,1938 to Jan. 24,1939, which was within a year and a half and two year period preceding his petition in bankruptcy, although the record shows he lived in an expensive manner. He testified he kept the money in his pocket with which he paid his expenses with from May 1938 to Jan.24,1939, yet the testimony shows he rented and lived in a two storyb rick house, with garage, and employed a Japanese cook, which established the fact that he had some reliable source of income which he was keeping under cover. No attempt was made to produce bank books, check stubs or cancelled checks as heretofore set out in this brief.

In re Karger v. Sandler (CCA 2) 62 Fed. (2d) 81, the court stated;

> "In this case, among other acts committed, the bankrupt had abandoned even a bank account and resorted to the extremely cumbersome method of paying his sister in cash for checks on her account with which to meet his own obligations. Such act on its face presupposes some motive which there was reasonable ground to take as sinister."

He could make no pretense of ignorance as to these matters. He had gone through bankruptcy before. His acts were not due to inadvertence. Matter of Janavitz, (CCA 3) 219 Fed. 876.

His failure to produce records that would show his financial condition and business transactions alled for an explanation, but none was forthcoming. Here there was no explanation made as to what had become of sizeable sums the bankrupt had received, or evidence showing what amounts had been turned over to him by the Music Corporation of America after they received checks for his services. There was a question as to diversion of funds through his agent Wilson, as also there is a question of diversion of funds through payments for musical arrangements, (set out under Point II of this brief), yet petitioner failed to produce any checks or records to substantiate these amounts.

Petitioner, under Point II of his brief, relies upon International Shoe Company vs. Lewine, 5th Cir. 68 Fed (2d)517, and on Hedges v. Bushnell, (10th Cir) 106 Fed. (2d) 979, where the court held that it is enough if the books or records sufficiently identify the transactions so that intelligible inquiry can be made respecting them, but in those cases and in re Baily vs. Balance, 4th Cir.123 Fed. (2d) 352, and Anderson v. Haddonfield National Bank, 3rd Cir. 94 Fed. (2d) 721,

also cited by petitioner, the books and records were exclusively those of the bankrupts and the entries therein contained related solely to and were identified only with the bankrupt's business. This is not true in the case at bar.

There is no conflict between the holdings of the Circuit Court in the case at bar and in Hedges vs. Bushnell, supra. In this case the bankrupt was a traveling man who worked on a small salary. In this case the court said:

> "Taking into consideration ** the kind and extent of business operated and the absence of evidence showing bad faith, we think the failure to keep books of account and the failure to keep more complete and detailed records was satisfactorily explained."

In the case at bar, there was evidence of bad faith and the District Court upheld the fourth specification as to false oath.

There is no conflict between the holding of the Circuit Court in the case at bar and International Shoe Co. vs. Lewine, supra. In this case the court held:

> "There was no evidence of diversion or of failure to surrender any specific property."

In the case at bar, there is evidence of diversion of funds through his agent Wilson and the financing of said petitioner by Wilson immediately after his petition was filed; as also there is a question of diversion of funds through moneys paid for musical arrangements.

None of the above cases presented the same factual situation under consideration at bar, and none of the above cases are in conflict with the holding of the Circuit Court in the case at bar.

In the Matter of Northbridge, D.C.N.Y. 53 Fed. (2d) 868, it was held:

> "The right to a discharge is a high privilege which should be granted only in clear cases where all statutory conditions have been met."

It is respectfully submitted that under all the circumstances, there was no justification for the failure of the bankrupt to keep books of account or records from which his financial condition and business transactions might be ascertained.

CONCLUSION.

Respondent submits that no special or important reasons have been made to appear for the exercise of this Court's jurisdiction as required by Rule 38 of Revised Rules of the Supreme Court of the United States.

Respondent submits further that the judgments of the courts below are correct both in law and in fact and that this petition should be denied.

Respectfully submitted,

RULA MARLENE RICH,

Respondent in person.